RUMAH NANAS RUBBER ESTATES SDN. BHD.

v.

N.M. ROTHSCHILD & SONS (SINGAPORE) LTD. & ORS.

HIGH COURT, SINGAPORE
WEE CHONG JIN CJ
CHAN SEK KEONG J
FA CHUA J
[CIVIL APPEAL NO. 107 OF 1987]
8 NOVEMBER 1989

BANKING: *Guarantee given by the defendants to the plaintiffs of an amount called the guaranteed amounts - Identical guarantees given by other parties - Option Agreements - Syndicated credit facilities - Loan facility and guarantee facility - Director of Freelin convicted - Termination by guarantors - Notice given to Freelin - Demand made on defendants - Guarantee Outstandings - Obligation of Freelin under Clause 16(B)(iii) - Scope of obligation - Agent - Whether negligent - Conditions precedent - Waiver - Disabling provision - Clause 3 of Agreement - Whether defendant's consent required - Change of guarantors - Whether liability of other guarantors affected - Several guarantee - Limit of liability.*

Freelin Investment Pte. Ltd., entered into 3 agreements with 3 stockbrokers, whereby Freelin granted to them an option to require Freelin to purchase from them certain shares. Freelin then entered into a syndicated credit facilities agreement with the plaintiffs and OCBC whereby OCBC and the 2nd to 6th plaintiffs agreed to make available to Freelin credit facilities of up to $13,710,600 to enable Freelin to pay for the option shares.

As part of the agreement, Freelin would procure the defendants and 5 other guarantors to issue, severally their respective guarantees, which collectively would secure the payment of 100% of all sums due or owing by Freelin to the agent and or the banks.

On 26 August 1986, Tan Koon Swan a director of Freelin, pleaded guilty to a change of Criminal breach of trust and was convicted and sentenced to imprisonment for 2 years and fined $500,000.

Immediately following this event, all the 6 guarantors notified the 1st plaintiff, as agent of the banks, of the termination of their guarantees. On 15 October 1986, the solicitors for the banks and the 1st plaintiff gave notice to Freelin and a copy of the notice was sent to the defendants and the co-guarantors.

On 1 December 1986, the plaintiffs commenced this action against the defendants claiming the sum of $2,434,519.38, being the guaranteed amounts, and default interest thereon. They obtained summary judgment before the Registrar. On appeal to the Judge in chambers, the defendants raised various defences, all of which were rejected. They have now appealed against the judgment on 7 grounds.

Held:

[1] It must have been clear to the defendants that the cause of action against them was that it was liable to pay to the plaintiffs the guaranteed amounts because Freelin had failed to perform its obligation under Clause 16(B)(iii) of the agreement.

[2] The claim against the defendants was not based on Freelin's failure to pay money which was owing but to provide a cash security under Clause 16(B)(iii).

[3] Although the statement of claim lacked particulars of the claim, it was not defective. Counsel for the defendants had merely failed or was unable to comprehend the nature of Freelin's liability upon which the claim against his clients was founded.

[4] If and when the judgment sum is paid, the Agent will have to hold it has security and to account for it in accordance with Clause 16(c) of the agreement. The liability of the defendants would be on different from that of a bank guarantor who has paid the sum guaranteed to the beneficiary of a performance guarantee.

[5] The conditions precedent in the agreement could be waived, and this did not prevent the banks from acting on any request of Freelin which did not satisfy the said conditions precedent.

[6] The defendants were not prejudiced at all when the 2 original guarantors were replaced, and the guarantee itself provided that such a change in the security arrangements would not be a defence to the defendant's liability as surety.

[7] The guarantee was a several guarantee for a fixed percentage of all sums due or owing by Freelin.

[Appeal dismissed with costs.]

For the appellants - Wu Chang Sheng (Eugene Lim with him)
For the respondents - Davinder Singh

JUDGMENT

Wee Chong Jin CJ, Chan Sek Keong J, FA Chua J:

This is an appeal by the defendants against the judgment of Thean J who dismissed the defendant' appeal against the decision of the Registrar giving leave to the plaintiffs to enter summary judgment in the sum of $2,434,519.38 together with default interest to the date of judgment and costs.

The plaintiffs' claim arose out of a guarantee dated 4 August 1986 ("the guarantee") given by the defendants to guarantee the payment by Freelin Investment Pte. Ltd. ("Freelin") to the plaintiffs of an amount therein called "the guaranteed amounts" (as defined. Five other parties gave identical guarantees for various other percentages of liability to the plaintiffs.

The guarantee was given in the following circumstances: in 1986, after the collapse of the Pan Electric Group of companies, Tan Koon Swan, who involved in the collapse, and who was also a director of Grand United Holdings Bhd. ("Grand United"), Supreme Corporation Bhd. ("Supreme"), used Freelin of which he was also a director, as his corporate vehicle to enter into 3 agreements ("option agreements") each dated 1 August 1986, with 3 stockbrokers, namely, EG Tan & Co. (Pte.) (in liquidation), J. Ballas & Co. (Pte) ("Ballas") and Ong & Co. Pte Ltd. ("Ong"), whereby Freelin granted to them an option i.e. a put option) to require Freelin to purchase from them the following shares: (i) 16,913,000 Grand United shares and (ii) 5,938,000 Supreme shares (collectively, "the Option Shares") at the total price of $13,710,60, subject to the terms and conditions provided therein.

Freelin, being a $2 company, then entered into a syndicated credit facilities agreement dated 4 August 1986 ("the agreement") with the plaintiffs and Overseas Chinese Banking Corporation Ltd. ("OCBC") whereby OCBC and the 2nd-6th plaintiffs (collectively, "the banks") agreed to make available to Freelin credit facilities of up to $13,710,600, ("the Facilities") to enable Freelin to pay for the Option Shares.

The Facilities consisted of guarantee facility and a loan facility. Under the guarantee facility, the banks would issue a guarantee to each of the stockbrokers ("the bank guarantees") to guarantee the payment by Freelin for the Option Shares; upon payments the banks, the Option Shares would be delivered to the banks to hold as security for the payments until reimbursement by Freelin. Under the loan facility, Freelin would be able draw down loans (called "Advances") to reimburse the banks. Upon such reimbursement, Freelin would become liable, under Clause 7, to repay the Advances on the "Repayment Date", which was fixed at 22 March 1988. The agreement also provided, by Clause 16, the cancellation of the Facilities on any one or more of 18 events of default and upon such cancellation, all Advances would becomes due and payable and Freelin would become obligated to pay to the Agent for credit to a Cash Collateral Account (as defined) a sum equal to the guarantee Outstanding (as defined). The purpose of the Cash Collateral Account was, as suggested by its name, to hold the payments as security for the banks' liabilities under the bank guarantees. As part of this financing arrangement and to secure the banks' exposures, Freelin would procure the defendants and 5 other guarantors to issue, severally, their respective guarantees which, collectively, would secure the payment of 100% of all sums due or owing by Freelin to the Agent and/or the banks.

The financing arrangements were finally put in place on 20 August 1986, when the banks, at the request of Freelin made pursuant to Clause 4 of the agreement, issued the 3 bank guarantees to the stockbrokers. On 26 August 1986, Tan Koon Swan, the person who as the Judge put it, "played a pivotal role in these transactions" pleaded guilty to a charge of criminal breach of trust and was convicted and sentenced to imprisonment for 2 years and fined $500,000. Immediately following this event, all the 6 guarantors notified the 1st plaintiff, as agent of the banks, of the termination of their guarantees. As observed by the learned Judge, these purported terminations had no legal effect, and this point was not in issue.

On 15 October 1986, the solicitors for the banks and the 1st plaintiff gave notice to Freelin, the material parts of which were as follows:

> We act for (the plaintiffs).
>
> 2. We refer to the S$13,710,600 Credit Facilities agreement dated 4 August 1986 and the Amendment agreement dated 21 August 1986 ("the Credit Facilities agreement") ...
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> 3. *Clause 16(A)* of the Credit Facilities Agreement provides that if at any time and for any reason, whether within or beyond the control of any party to the Credit Facilities agreement, any of the events described therein occur then, at any time whether or not any such event is continuing, the Agent may by notice to you declare that an Event of Default has occurred and in the same notice, make the declaration under sub-clause (B) of Clause 16.
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> 4. By this letter, the Agent declares that an Event of Default has occurred by reason of the occurrence of any one or more of the following events:
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> (1) TKS has been placed under custody (see Clause 16(A)(X) of the Credit Facilities agreement); and/or
>
> (2) the following guarantors have by notice set out against their respective names (copies of which are enclosed herewith) claimed that the guarantees to which they are each party have ceased to be their (and each of them's) legal and valid obligation, binding upon each of them in accordance with the terms of the guarantees.
>
> [Particulars of Name, Notice and Date]
>
> [See Clause 16(A)(xiii) of the Credit Facilities agreement]; and/or

(3) the notices referred to in (2) above and the terms thereof in the opinion of the Majority Banks, gives reasonable grounds for believing that the guarantors on behalf of whom the said notices were issued (or one or more of them) may not perform or comply with any one or more of its or his obligations under its or his guarantee (see Clause 16(A)(xviii) of the Credit Facilities agreement).

5. In the exercise of its rights under Clause 16(B) of the Credit Facilities agreement, the Agent hereby declares:

(1) the Facilities to be cancelled; and

(2) that you are to pay to the Agent for credit to the Cash Collateral Account a sum equal to the guarantee outstandings.

6. By reason of this declaration, the Facilities are cancelled and the sum equal to the guarantee outstandings, i.e. S$13,710,600 has become due and payable.

7. Please be notified that in the event you fail to immediately pay the said sum of S$13,710,600, our clients shall exercise all rights available to them under the credit Facilities agreement, the guarantees or otherwise, and all rights against you and any other party are hereby expressly reserved.

A copy of this notice was sent to the defendants and the co-guarantors.

Prior to this declaration of default, Ballas had, on 4 September 1986, exercised its put option and delivered, on 17 October 1986, the 7,523,000 Grand United shares to the Agent for payment of $4,513,800. Payment was made on 21 October 1986. On 22 October 1986, Ong also exercised its put option and on or about 4 December 1986 delivered 1,438,000 Supreme shares and 3,390,000 Grand United shares to the Agent for payment of $2,896,000. Payment was made on 8 December 1986.

On 31 October 1986 the plaintiffs, through their solicitors, made a demand on the defendants for payment of the guaranteed amounts. On 1 December 1986, the plaintiffs commenced this action against the defendants claiming the sum of $2,434,519.38, being the guaranteed amounts, and default interest thereon. They obtained summary judgment before the Registrar. On appeal to the Judge in chambers, the defendants raised various defences all of which were rejected. They have now appealed against the judgment on 7 grounds.

The first two grounds of appeal may conveniently be considered together. The first is that the learned Judge was wrong in holding that the statement of claim has disclosed no cause of action against the defendants. The defendants had submitted that the statement of claim was seriously defective in that it had failed to plead how the principal debt was incurred and that the action had been commenced prematurely in respect of 2 of the 3 bank guarantees. The second is that the plaintiffs' claim against the defendants did not represent the true nature of their contractual recourse to the defendants. It was submitted by Counsel for the defendants that the plaintiff's claim was for specific performance of a term of the agreement and not a claim for a debt which was what the statement of claim purported to do.

These arguments were rejected by the learned Judge who held that the essential averments were present in the statement of claim in that the material terms of the agreement and the guarantee have been pleaded and that the claim was essentially for the defendants' liability for the total amount owing by Freelin to the 2nd-6th plaintiffs.

The cause of action against the defendants was set out in paras. 2, 6 and 7 of the statement of claim. Paragraph 2 pleaded the defendants' liability under the guarantee (without specifying the relevant clause thereof, which is Clause 2) to pay to the plaintiffs the guaranteed amounts on first demand in the event that Freelin failed to pay the same. Paragraph 6 pleaded Freelin's

failure to pay $13,710,600 pursuant to the said declaration of default made under the agreement (again without specifying the relevant clause thereof, which was Clause 16(B)(iii)). Paragraph 7 pleaded the demand for payment made on 31 October 1986 and the defendants' failure to pay the guarantees amounts.

Clause 2 of the guarantee provided as follows:

> In consideration of the Agent or the banks acting under or in connection with the agreement ..., the guarantor ... guarantees ... the payment ... by (Freelin) of the guaranteed amounts and ... undertakes and agrees that, if ... (Freelin) does not make such payment ... the guarantor will pay to the Agent (for is own account or for the account of the banks ...) the guaranteed amounts upon first demand by the Agent.

The expression "guaranteed amounts" was defined to mean:

> 22.73 per cent. of all sums (whether principal, interest, fee or otherwise) whatsoever which are at any time may be or become due or owing by (Freelin) to the Agent and/or the banks ... under or in connection with the agreement.

Freelin's default in payment which formed the basis of the action against the defendants is set out in Clause 16(B)(iii) of the agreement. Clause 16(B) provided as follows:

> 16(B) *Cancellation/Acceleration*: At any time after making a declaration under sub-Clause (A) above and whether or not any event mentioned in that sub-Clause is continuing the Agent may and, if so instructed by the Majority Banks, shall by notice to the Purchaser declare:
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> (i) the Facilities to be cancelled, where-upon they shall be cancelled; and/or
>
> (ii) all Advances, accrued interest thereon and any other sum then payable under this agreement to be immediately due and payable, whereupon they shall become so due and payable; and/or
>
> (iii) the Purchaser to pay to the Agent for credit to the Cash Collateral Account a sum equal to the guarantee outstandings, whereupon such sum shall become so due payable.
>
> Any declaration under this sub-Clause (B) may only be made after declaration under sub-Clause (a) above but may be made in the same notice as (but following) a declaration under sub-Clause (A).

"Guarantee Outstandings" means, at any relevant time in relation to a bank guarantee, the aggregate of the maximum actual contingent liabilities of the banks at that time under that bank guarantee and, if any payment has been made by a bank under that bank guarantee but not reimbursed by the purchaser in full to that bank, the aggregate of the purchaser's maximum actual and contingent liabilities at that time in connection with that bank guarantee.

The declaration of default of 15 October 1986, the validity of which was not in issue, resulted in the termination of the Facilities before any Advance was made. Thereafter, no Advance was possible and therefore no Advance could become due and payable under Clause 16(B)(ii). The only obligation of Freelin at that moment was under Clause 16(B)(iii), and this was what the notice of 15 October 1986 required Freelin to do.

When this action was commenced on 1 December 1986, the banks had made only one payment, on 21 October 1986, of $4,513,800 to Ballas under the bank guarantee. On 22 October 1989, the Agent, by its solicitors, made a demand in writing to Freelin under Clause 5 of the agreement to pay to the Agent the amount paid to Ballas. Similarly, after the banks had made payment to Ong on 8 December 1986 under the bank guarantee, the Agent sent a notice in similar terms to Freelin on 12 December 1986. However, there is nothing in the statement of claim which makes reference to Freelin's liability under Clause 5 of the agreement as the basis of the claim against the defendants in this action.

Accordingly, it must been clear to the defendants that the cause of action against them as set out in paras. 2, 6 and 7 of the statement of claim was that it was liable to pay to the plaintiffs the guaranteed amounts because Freelin and failed to perform its obligation under Clause 16(B)(iii) of the agreement, which was "to pay to the Agent for credit to the Cash collateral Account a sum equal to the guarantee Outstandings ...". This cause of action was also a complete answer to another argument of Counsel for the defendants that the action was premature in respect of two of the bank guarantees. The fact that Freelin did not owe the banks the amount of $13,710,600 at the date of the action was irrelevant. The claim against the defendants was not based on Freelin's failure to pay money which was owing but to provide a cash security under Clause 16(B)(iii). What the statement of claim lacked, as correctly observed by the learned Judge, was particulars of the claim. We agree with his view that the statement of claim was not defective. Counsel for the defendants had merely failed or unable to comprehend the nature of Freelin's liability upon which the claim against his clients was founded. It is true that the terms of the judgment obtained by the plaintiffs do not make clear how the judgment amount is to be disposed of. In our view, if and when it is paid, the Agent will have to hold it as security and to account for it in accordance with Clause 16(c) of the agreement. In this respect, the liability of the defendants would be no different from that of a bank guarantor who has paid the sum guaranteed to the beneficiary of a performance guarantee.

The third, fourth and fifth grounds concerned the alleged negligent performance by the Agent of Clause 3 of the agreement (entitled "Conditions Precedent") which provided that (Freelin) might not "make its first request for the issue of a bank guarantee until the Agent has confirmed to it that the Agent has confirmed to it that the Agent has received each of the documents listed in schedule 4 and has found them satisfactory." Schedule 4 also bore the same heading "Conditions Precedent" and para. 17 thereof provided as follows:

> 17. Evidence satisfactory to the Agent and the Majority banks that the Option Securities will be re-quoted on the Official List of each of the Stock Exchange of Singapore Limited and The Kuala Lumpur Stock Exchange within three months of the date of this agreement.

It was contended by Counsel for the defendants that the Agent, as agent for the banks, had negligently enables Freelin to make a request for the issue of the 3 bank guarantees by finding that the documents obtained in relation to para. 17 were "satisfactory" when there was insufficient evidence on which they could have found them to be satisfactory in terms of para. 17. These documents consisted of letters from the Stock Exchange of Singapore and the Kuala Lumpur Stock Exchange relating to the requests of Grand United and Supreme for the Option Shares to be re-listed for trading on such exchanges. It was contended that on a reasonable construction of those letters, the condition that there was evidence that the Option Shares would be so re-listed within 3 months of the date of the agreement had not and could not have been satisfied. This argument which was canvassed before the learned Judge was dismissed by him on the following grounds: (i) "the question whether these documents constituted satisfactory evidence is a matter for the 1st plaintiff and the banks to decide at the material time, and at that time, they found the documents satisfactory for the purpose of the condition.", (2) the conditions precedent was provided for the benefit of the 1st plaintiff and the banks, and they were entitled to waive it, and that any such waiver did not relieve the defendants from liability by reason of Clause 3(A) of the guarantee which also expressly for the delisting or suspension of Option Shares on both the Stock Exchanges.

Clause 3 of the agreement was a disabling provision affecting the right of Freelin to request the banks to issue the bank guarantees. As between the banks and Freelin, there was nothing in the agreement to prevent the banks from waiving these conditions precedent and to act

on any request of Freelin which did not satisfy the said conditions precedent. By doing so, the banks would merely have been taking a risk on the Option Shares not being re-quoted within 3 months or at all. In this respect we agree with the view of the learned Judge that this condition was taken for the benefit of the banks. Even if it were also taken for the benefit of Freelin, Freelin had in fact waived it by making the request. That was the legal position between the banks and Freelin.

However, the point also have great significance for the defendants on the ground that the defendants, being a guarantor, would have been entitled to the benefit of the security on the Option Shares upon discharging their obligation under the guarantee. The guarantee expressly provided (by Clause 14) for this event. Counsel for the defendants accordingly argued before the Judge that the conditions precedent in Clause 2 of the agreement was imposed also for the benefit of the defendants, and as such, could not be waived without the defendants' consent. In our view, the learned Judge was correct. If the conditions precedent had been imposed also for the benefit of the defendants, it would have been easy to provide in the agreement or the guarantee that the defendants' guarantee would not come into force until the condition precedent had been complied with in accordance with its terms. On the affidavit evidence before the learned Judge, it was clear that the plaintiffs made no representation whatever to the defendants about the condition precedent and that it was Tan Koon Swan who somehow was able to convince Tan Sri Khoo Teck Puat that the Option Shares would be relisted within 3 months from the signing of the agreement. Furthermore, Tan Sri Khoo, in para. 7 of his affidavit affirmed on 14 May 1987 admitted as follows: "Further as I now know, the relisting of the shares was not a strict condition precedent to the defendants' liability under the guarantee ...".

The sixth and seventh grounds of appeal can be taken together. The sixth ground was that the defendants were released from liability under the guarantee because 2 of the original guarantors were replaced by 2 new guarantors without the consent of the defendants. We agree with the learned Judge that there was nothing in this point for the reasons given by him, i.e. the defendants were not prejudiced at all and the guarantee itself provided that such a change in the security arrangements would not be a defence to the defendants' liability as surety.

The seventh ground was that the defendants' liability under the guarantee was 22.73% of that was due or owing, and that as one of the other guarantors had already paid a certain sum to the plaintiffs under his guarantee, the defendant's liability was automatically reduced to its agreed percentage of the balance due or owing. There is no merit in this argument. The guarantee was several guarantee for a fixed percentage of all sums due or owing by Freelin. Each of the other guarantors was also liable for his fixed percentage. All these percentages added up to 100% of the indebtedness or liability of Freelin. If this argument were correct, then the total amount recoverable by the plaintiffs under the 6 guarantees was dependent entirely upon how and when the guarantors would or could pay under their guarantees. It meant that the plaintiffs could never recover 100% of their exposure, which must be what they intended under the 6 guarantees, unless all the 6 guarantors honour their respective obligations at the same time. In our view, commercial transactions must be interpreted to give them commercial sense.

For the reasons given above, the appeal is dismissed with costs.

Also found at [1990] 1 CLJ 401